STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Neff, P.J., Murphy and Griffin, JJ.

CRAIG A. KLAPP,

Plaintiff/Appellant,

v.

UNITED INSURANCE GROUP AGENCY, INC.,

Defendant/Appellee.
_____/

Supreme Court Case No. 119175-6

Court of Appeals Docket No. 219330

Consolidated with Docket No. 219299

Van Buren Circuit Court
Case No. 97-043305-CK

BRIEF ON APPEAL - APPELLANT

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STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to MCR 7.301(A)(2) and 7.302. The decision of the Court of Appeals under review was issued February 9, 2001. Plaintiff filed a motion for rehearing in the Court of Appeals on March 2, 2001. The Court of Appeals denied rehearing by order dated April 17, 2001, and plaintiff filed his application for leave to appeal in this Court on May 8, 2001. This Court granted plaintiff's application by order dated September 10, 2002.

STATEMENT OF QUESTIONS INVOLVED

1. In the contract that defendant drafted, did defendant create a conflict and ambiguity regarding the vesting of an insurance agent's renewal commissions where defendant stated in the text of the actual contract that the commissions "shall be vested" based on years of service, and a separate, preexisting document prepared by defendant, upon which defendant now relies, purports to state that "vestment" is based on other criteria?

Plaintiff/Appellant answers "yes."

The trial court answered "yes."

The Court of Appeals answered "no."

2. Did the Court of Appeals err by attempting to resolve the conflict and ambiguity with a contract construction that neither party contended to be plausible or correct and a construction that is inconsistent with another provision of the contract that the Court of Appeals overlooked and never considered?

Plaintiff/Appellant answers "yes."

The Court of Appeals answered "no."

3. Where, as in the present case, a contract is drafted entirely by one party, without any bilateral negotiations, is extrinsic evidence admissible to clarify ambiguity in the contract or is

any ambiguity in the contract simply to be construed against the drafter (without considering any extrinsic evidence)?

Plaintiff/Appellant answers that extrinsic evidence is admissible, and that the ambiguity should simply be construed against the drafter in circumstances where extrinsic evidence to clarify the ambiguity does not exist.

The Court of Appeals did not answer this question.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This is a contract ambiguity case. The contract at issue, a standardized contract drafted solely by defendant, is not only contradictory and unclear, it is a jumbled mess. After a full and fair trial, the jury returned a verdict in favor of plaintiff Craig A. Klapp (Klapp) on his claim for breach of the ambiguous contract. The Court of Appeals erred by casting the jury verdict aside with a superficial determination that the contract was not ambiguous. The Court should reverse the Court of Appeals and reinstate the trial court's judgment.

A. Background Facts.

Defendant United Insurance Group Agency, Inc. (UIG) is an independent insurance agency based in South Lyon, Michigan. UIG employs a number of sub-agents to sell insurance products on its behalf. The employment is accomplished by having the persons sign an "Agent's Agreement," which is a standardized contract that UIG drafted without any bilateral negotiations between UIG and the agents. UIG compensates the agents solely by commission. In particular, the agent receives a percentage of the premium paid by the purchaser of the insurance product, both for the initial purchase of the policy and the periodic renewals thereafter. This case concerns the agent's rights to the renewal commission.

There are two versions of UIG's Agent's Agreement pertinent to the case. One version is the Agent's Agreement used by UIG for a number of years prior to 1989. (Appellant's App at 2a.) This version of UIG's contract did not provide for the "vesting" of the agent's renewal commissions based on the length of time that the agent worked for UIG. Rather, under

this prior version of the contract, an agent's rights to renewals ceased upon termination of the relationship, unless there was a "death, retirement or total disability" of the agent. (4a.) If there was a death, retirement or total disability, then the agent was "vested" and was entitled to the renewal commissions. (4a.) In a separate document entitled "Agent's Manual," UIG specified that "Retirement is understood to be disengagement from the insurance industry. Vestment for retirement is age 65 or 10 years of service whichever is later." (8a.)[1] Accordingly, under this prior version of the Agent's Agreement, when combined with the Agent's Manual, UIG defined "retirement" as "disengagement from the insurance industry," and there was no vesting of renewal commissions for such an agent who disengaged from the insurance industry unless the agent both attained age 65 and worked for 10 years.

The second version of the Agent's Agreement is the version that UIG implemented beginning in 1989. (9a.) According to UIG management, the purpose of this new contract was to make the relationship with UIG more attractive to a prospective agent. (86a.) To that end, the new contract contains greater vesting rights for renewal commissions upon termination of the relationship. In particular, UIG added an entirely new provision to its standardized contract, Section 5(B), which UIG entitled "Vesting Schedule." (13a.) This new provision states, in pertinent part, as follows:

> 5. VESTED COMMISSIONS. Commissions shall be vested in the following manner:

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[1]The Agent's Manual is a lengthy document that UIG promulgated as early as 1986. (87-88a.) The page at 8a is the relevant excerpt from the entire document, which is in the record as trial exhibit 13.

. . .

(B) Vesting Schedule. In the event of a termination of this Agreement for reasons of death, disability, and retirement (as defined in the *Agent's Manual),* Agent as set forth below on the date of execution hereof shall be entitled to receive a percentage of renewal commissions then payable from premiums on Agent's policies in place, applicable to such amounts as would otherwise have been payable to Agent in accordance with the following vesting schedule:

Agent's Years of Service	**% of Renewals Vested**
Less than 2 years	0%
2 years	10%
3 years	30%
4 years	50%
5 years	70%
6 years	90%
7 years	100%
8 years	110%
9 years	120%
10 years	130%
11 years	140%
12 years	150%

. . .

When the aggregate renewals payable to Agent hereunder shall total less than Forty-One Dollars and Sixty-Seven Cents ($41.67) per month, United shall no longer be obligated to make further vested renewal commission payment to Agent. (13a.)

Thus, to "sweeten the pot" for the agents, UIG granted vesting rights for renewal commissions based on the number of years of service by the agent. As set forth in the new "Vesting Schedule," an agent with two years of service was 10% vested. An agent with three years was 30% vested, and so on, up to 12 years, when the agent was 150% vested,

meaning that such an agent was vested for all of his renewal commissions, plus an additional 50% as a premium for his extended years of service. In a letter to the agents a couple of years later, UIG management would characterize this new Vesting Schedule provision as "time of service vesting." (17a.)

Upon drafting and implementing this new contract in 1989, UIG immediately began paying the agents who signed the new contract in accordance with the Vesting Schedule. In particular, when an agent retired by disengaging from the insurance industry, UIG paid the agent the specified percentage of that agent's renewal commissions set forth in the Vesting Schedule. An agent who stopped working in the industry, for example, after 4 years received 50% of his renewals. (79-80a.)

This course of dealing by UIG under the new contract, furthermore, was a consistent and uniform practice that lasted approximately 10 years (it did not change until after Klapp later filed suit in 1997). (80a.) In all, there were 33 such agents in addition to Klapp who decided to disengage from the industry and to whom UIG paid their percentages of renewals under the Vesting Schedule. (26a.) Some of these agents who disengaged from the industry were formally terminated by UIG, while others were deemed by UIG to be "inactive" because, although they were not formally terminated, they were no longer selling insurance products. (84-85a.) Moreover, this uniform and consistent practice of paying agents in accordance with the Vesting Schedule was not some decade-long mistake or oversight by a UIG clerical employee. It was the contract interpretation adopted by UIG senior management for implementing the new Agent's Agreement. (81-84a.)

Klapp began working for UIG in March 1990 and he, too, signed the new contract. (10a.) At the time, UIG management represented to Klapp that his vesting rights were defined solely by the Vesting Schedule (90-91a), and UIG thereafter treated Klapp exactly like it treated the other 33 agents who decided to stop working in the insurance industry under the new contract. Specifically, in 1994, after four years of service and when he was 50% vested under the Vesting Schedule, Klapp decided to disengage from the insurance industry, and UIG issued a letter formally terminating his contract. (27a.) UIG then paid Klapp his vested commissions under the Vesting Schedule, namely, 50% of his renewal commissions corresponding to four years of service. (28a.) After a number of months of 50% payments, Klapp decided to get back into the business, and UIG reinstated his contract. (89a.)

Klapp continued working for UIG until April 1997, when he decided to pursue a career in the construction industry. At this point, Klapp was 100% vested under the Vesting Schedule, corresponding to seven years of service, and UIG once again paid Klapp his vested commissions under the Vesting Schedule. UIG continued these 100% payments until August 13, 1997. (32a.)

On August 13, 1997, UIG ceased paying Klapp's vested commissions by falsely accusing Klapp of misconduct. UIG sent a letter stating that UIG had "been conducting an investigation" of Klapp, and that UIG had determined that Klapp had "maintained appointments with insurance companies that are not contracted with United Insurance Group." (45a.) In other words, UIG accused Klapp of selling insurance policies from insurance

companies not approved by UIG, and UIG used this accusation as a basis to stop the payment of his vested renewals.

UIG's accusation against him, Klapp knew, was wholly inaccurate. He had not done anything wrong, but merely had gotten out of the industry. In the complaint that he filed against UIG for breach of the Agent's Agreement, Klapp specifically alleged that UIG's accusation was false. (46a.) Nonetheless, UIG denied Klapp's complaint allegation (47a) and continued to rely on the misconduct accusation throughout the proceedings in the trial court as a basis to cease renewal commission payments to Klapp, despite the fact that Klapp provided UIG with records establishing the falseness of the charge. It was not until UIG filed its proposed jury instructions one week before trial, some 18 months later, that UIG finally admitted that the accusation was a "mistake." (48a.)

After Klapp filed this action, UIG also cut off commission payments to the 33 other retired agents who had been receiving their vested commissions under the Vesting Schedule. (80a.) Whether or not this was done to bolster its litigation posture against Klapp, or whether it was done because the economic liability became too onerous over time, UIG apparently noticed in defending against Klapp's claim that it had failed to delete the age 65/10 year language in the Agent's Manual when it instituted the new contract in 1989. UIG now contended that Klapp and the 33 other agents were no longer entitled to their renewal commissions under the Vesting Schedule because they had not both worked 10 years and attained the age of 65. UIG contended that these agents had no vesting rights whatsoever, despite the patent conflict between the Vesting Schedule and the decade-long course of dealing

on the one hand, and the outdated age 65/10 year language in the Agent's Manual on the other.

B. UIG's Motion for Summary Disposition and Trial Proceedings.

Before the close of discovery in the trial court, UIG moved for summary disposition. UIG argued that its contract was clear and unambiguous and, apart from the false accusation of misconduct against Klapp, that Klapp was not entitled to any vested commissions because he did not satisfy the language in the Agent's Manual. UIG attempted to explain away its 10-year history of paying retired agents under the Vesting Schedule, including Klapp himself, as a bout of "confusion." UIG advanced this paradox: "Notwithstanding that the terms and provisions are clear and unambiguous, Defendant has admitted that was [sic] confusion and a mistake in paying renewal commissions was in fact made." (71a.)

In opposing summary disposition, Klapp focused on the two key terms in the Vesting Schedule: "vesting" and "retirement." Klapp established that the term "vesting" means the granting of a "guaranteed" or "inalienable" right to the renewal commissions, and that the term "retirement" means "disengagement from the insurance industry." Klapp thus established that the Vesting Schedule provisions of the contract guaranteed him the payment of 100% of his renewal commissions upon his disengagement from the insurance industry in April 1997, directly contrary to UIG's decision to cease his payments in August 1997.

Concerning "vesting," UIG's own witnesses testified [2] as follows:

> Q So you understand vesting to mean that renewal commissions are guaranteed so long as the policyholder continues the payments?
> A That's correct.
> Q And do you consider that to be - that understanding of vesting as you have described it to be standard to the industry?
> A To my knowledge, that's what it means.
> Q And are you aware of any other circumstances in the industry in which the terminology vesting has a different meaning?
> A I am not aware of any. (Schroeder tr p 225).
>
> ...
>
> Q So after seven years of service the commissions are guaranteed at 100 percent?
> A Yes. (Schroeder tr. p 243).
>
> ...
>
> Q And you understand the industry practice to be that if there is a not-for-cause termination, then the agency or the agent continues to receive renewal commissions as long as the agency or agent if vested?
> A That's correct. (Schroeder tr. p 224). (58a.)

Thus, by using the term "vesting" the new Agent's Agreement and in the Vesting Schedule in particular, UIG promised that renewal commissions were guaranteed to the agent based on the agent's years of service. This meaning is consistent with the common dictionary definition of the term "vest" or "vesting," which is "to grant or endow with a particular authority, right, or property," or "the conveying to an employee of the inalienable

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[2]UIG moved for summary disposition under MCR 2.116(C)(10). As required by that rule, Klapp opposed the motion with documentary evidence and deposition testimony, and the testimony cited in this brief is taken from the actual testimony submitted in opposition to the motion. For the Court's convenience, the brief that Klapp submitted in opposition to the motion is reproduced at 49-70a.

right to share in a pension fund, [especially] **in the event of termination of employment prior to the normal retirement age**." (59, 74a.) (emphasis added)

Concerning the term "retirement" in paragraph 5(B) of the Agent's Agreement, it was also undisputed at summary disposition that the term "retirement" meant "disengagement from the insurance industry," and nothing more. That is the specific definition set forth in the Agent's Manual ("Retirement is understood to be disengagement from the insurance industry") (8a), and that is the definition which UIG's own witnesses admitted to be applicable, because the new contract, by its plain terms, incorporates only the definition of retirement from the Agent's Manual ("as defined in the *Agent's Manual*") (13a) ; it does not even purport to incorporate the old age 65/10 year vesting requirements. UIG's witnesses testified:

> Q So retirement is defined as disengagement from the insurance industry?
> A That's correct.
> Q So if a person with seven years, seven full years of service --
> A Yes.
> Q -- becomes disengaged from the insurance industry after seven full years--
> A Yes.
> Q --he has retired, right?
> A Yes.
> Q And that would be the case whether it was the agent who decided to leave the industry himself or if United Insurance decided at his option to terminate his contract and the agent left the industry, right?
> A Yes.
> Q So an agent then -- in Mr. Klapp's case, he was there for seven years, full years of service, right?
> A I believe so.
> Q And you terminated him, right?
> A Yes.

Q And to your knowledge has he stayed disengaged from the insurance industry?
A To my knowledge, yes.
Q So to your knowledge Mr. Klapp is retired, right?
A As defined in the contract and agent's manual, yes. (Schroeder tr. pp 240-241).

...

Q Retirement means disengagement from the insurance industry, correct?
A Yes. (Schroeder tr. p 248).

...

Q All right. And my question is, what criteria does a person have to satisfy in order to be retired?
A Disengagement from the insurance industry.
Q All right.
A And termination from -- termination from his engagement with United Insurance Group and disengagement from the insurance industry.
Q Okay. So you acknowledge that a person is retired if he disengages from the insurance industry and is terminated by United Insurance.
A Yes. (Pavlock tr. p 59-60).[3]

...

Q And you recognize, as we sit here today, on a closer reading of these papers, that the criteria for retirement does not include a 10 year minimum years of service requirement, correct?
A That's correct. (Pavlock tr. p 65) (59-60a.)

Thus, considering the meaning of the terms "vesting" and "retirement" in the contract, UIG promised in paragraph 5(B) to pay an agent a guaranteed percentage of renewal commissions upon the agent's disengagement from the insurance industry. In Klapp's case, it was undisputed that he had seven years of service when he retired, or disengaged from the

[3]Significantly, Robert Pavlock is the attorney who assisted UIG in drafting the new contract.

insurance industry, and he was thus vested, or guaranteed, renewals at the 100 % level in the Vesting Schedule.

In addition to the foregoing analysis concerning "vesting" and "retirement," Klapp also presented evidence in opposing UIG's motion for summary disposition establishing that the position advocated by UIG, once Klapp had filed suit, was absurd and made no sense. UIG's own witnesses admitted that UIG's litigation posture of reliance on the outdated age 65/10 year language in the Agent's Manual simply was nonsense in light of the new Vesting Schedule, whereas UIG's pre-litigation, decade-long way of interpreting the contract made sense:

> Q All right. Now, my question is, how does it [the Vesting Schedule] apply to retirement at a level four-year, five-year, six-year or seven-year years of service? How does it apply if retirement is supposed to be 10 years?
> A It -- it wouldn't.
> Q It doesn't make sense, does it?
> A Nope.
> Q To read it the way you are reading it, does it?
> A The way you've explained it to me, it doesn't.
> Q Okay. (Schroeder tr. p 135).
>
> ...
>
> Q ... A person -- let's just assume that what this contract means is the way that you have been interpreting it in the past before you changed and found a new interpretation. And the way that was, was that when a person retired, meaning he got out of the industry, you looked at the years of service here on paragraph 5(b) vesting schedule and you paid him the percentage that corresponds,
> right?
> A Yes.
> Q So a person who worked at -- started at age 62, worked until age 65, got a 30 percent renewal starting at age 65 when he left the industry, right?

A Yes.
Q If we use your new reading of the contract, we don't have an answer for that guy, do we?
A I'm saying I don't know. I'm saying I can't answer, is all. (Schroeder tr. pp 323-234).

...

Q All right. And if an agent has to work ten years or age 65, whichever is later, in order to receive renewal commissions upon termination, what sense does it make to have seven years in this Vesting Schedule at 100 percent, or what sense does it make to have five years of service at 70 percent?
A I can't think of any. (Lee tr. p 84).

...

Q But there would be some sense and reason to having, for example, seven years at 100 percent in this Vesting Schedule if the company followed its procedures for carrying out this contract as it did before 1997, right? Because a five-year agent would receive 70 percent, and a seven-year agent would receive 100 percent. Those years of service and vesting percentages would have some
meaning, wouldn't they?
A Yes.
Q And the way the company now wants to carry out this contract, by stopping payments to terminated agents, this Vesting Schedule, and in particular the five years and seven years, for example, makes no sense, does it?
A I can't think of any situation where it would. (Lee tr. p 65)

...

Q Well, my question is this. What your company has decided to do, by terminating renewal commissions to terminated agents, is to carry out this contract in a way that doesn't make sense for a seven-year agent, whereas the way it was carrying it out before 1997 did make sense to a seven-year agent, right?
A From what I can see at this point, yes. (Lee tr. p 86).

...

Q All right, And so I guess my question is, can you explain to me how this entry for seven years at 100 percent makes any sense if we interpret the contract the way that United Insurance Group does after they stopped paying these renewal commissions?
A No, I can't explain that to you. (Pavlock tr. p 123).

...

Q Now, what does that [10% vesting in vesting schedule] mean to him, [an agent who retires after two years]?
A It means nothing.
Q Okay. And so this percentage, according to you, could well have been 20 percent -
A Right.
Q --for two years?
A Right.
Q Because it doesn't mean anything to the agent?
A That's exactly right.
Q And it could be 80 percent --
A Right.
Q --after two years, because it doesn't mean anything to the agent?
A Right. (Thaens tr. p 66).

...

Q Okay. So speaking of a retired agent, the numbers from less than two years, at zero percent, up to nine years at 120 percent, those percentages could have been anything, because they don't mean anything to the agent?
A Up to what year did you say?
Q Up to nine years at 120 percent.
A Yeah. That's correct. (Thaens tr. pp 68-69).

...

Q Before 1997, your company carried out this contract by giving meaning to the entries of less than two years at zero percent through nine years at 120 percent in the case of any agent who disengaged from the insurance industry, true?
A I understand that, yes. (Thaens tr. p 104). (62-63a.)

In seeking summary disposition, UIG responded to this evidence simply by contending that the Vesting Schedule should be ignored in construing the contract it had drafted. At the hearing on the motion, UIG argued that "we don't get to the vesting schedule." (75a.) At no time in the trial court (or on appeal, for that matter) did UIG even attempt to reconcile the Vesting Schedule with the contradictory age 65/10 year language in the Agent's Manual. For UIG, the Vesting Schedule suddenly no longer existed, despite the fact that it had honored the Vesting Schedule for the prior decade.

The trial court denied UIG's motion for summary disposition and sent Klapp's breach of contract claim to the jury. (77a.) At trial, both sides presented evidence extrinsic to the contract, and the jury was then instructed that the dispute for the jury to resolve was the "meaning" of the Agent's Agreement. (94a.) Among other things, the jury was instructed, in considering what obligations UIG had under the contract, to consider "the words of the contract as well as the parties' actions." (95a.) The jury was further instructed that it should consider the "interpretation that the parties themselves had given to the Agent's Agreement used by United Insurance for Mr. Klapp and other agents." (95a.) In addition, the jury was instructed that ambiguities in the contract "should be interpreted against" UIG as the party that drafted the contract, and that it should, if possible, give meaning and effect to all provisions of the contract and Agent's Manual. (95-97a.) The jury was never instructed that it had the duty to decide whether the contract was ambiguous or not.[4]

The jury returned a verdict in favor of Klapp and awarded Klapp damages for unpaid renewal commissions through the time of trial. The trial court entered a judgment consistent with the verdict. (98a.)

C. Court of Appeals Proceedings.

Following entry of judgment, both sides appealed. Klapp appealed the trial court's dismissal of his claim for enhanced damages under the Sales Representatives'

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[4]It must be noted that neither Klapp nor UIG has challenged the jury instructions or the trial court's admission of extrinsic evidence on appeal.

Commission Act, MCL 600.2961. UIG appealed the trial court's denial of its motion for summary disposition, as well as various issues regarding the amount of damages awarded by the jury. In its decision dated February 9, 2001, the Court of Appeals reversed the denial of UIG's summary disposition motion, thereby declaring Klapp's appeal and the other issues raised by UIG to be moot. (100a.)

The basis for the Court of Appeals' decision was that the contract was unambiguous. In making that determination, the Court of Appeals rejected both of the two opposing contract interpretations advocated by the parties. As noted above, Klapp contended that the Vesting Schedule granted an agent vested rights beginning at two years of service, or, at a minimum, that the Vesting Schedule (and years two through nine of the schedule in particular) directly conflicted with the age 65/10 year language in the Agent's Manual, creating a classic case of ambiguity that the jury was properly permitted to resolve, and did resolve, against UIG. UIG, in contrast, contended that years two through nine of the Vesting Schedule should be ignored, and that the only relevant inquiry was whether Klapp satisfied the age 65/10 year criteria in the Agent's Manual.

Significantly, neither Klapp nor UIG ever contended that the proper interpretation of the contract was that years two through nine of the Vesting Schedule were only relevant for agents who died or became disabled, as opposed to agents who retired. No such interpretation was ever advanced by either party for two reasons. First, a different provision in the contract, paragraph 5(A), granted an agent who died or became disabled vesting at the 100% level from the outset of the relationship, so that the percentages in the

vesting schedule for years two through nine would never have any relevance for such an agent. (12a.) Second, consistent with paragraph 5(A), the president of UIG testified, in no uncertain terms, that an agent who died or became disabled was indeed vested at the 100% level from the outset, and thus that the early years of the Vesting Schedule had no relevance for such an agent. He testified:

> THE COURT: So, this chart [Vesting Schedule] doesn't really, this renewals vested doesn't really have anything to do with death or disability, those are 100%?
>
> THE WITNESS: That is correct.
>
> . . . . . .
>
> Q. You say it [the Vesting Schedule] doesn't apply to death and disability?
>
> A. That is true, you get 100% for death and disability. (92-93a.)

Nonetheless, in declaring the contract to be unambiguous, the Court of appeals rejected the two opposing contract constructions advanced by the parties. Obviously, the Court of Appeals could not accept UIG's assertion that years two through nine of the Vesting Schedule should simply be ignored. On the other hand, in order to reject Klapp's contention that years two through nine of the Vesting Schedule conflict with the age 65/10 year language in the Agent's Manual, the Court of Appeals was forced to divine some meaning to years two through nine that could appear to be superficially consistent with the age 65/10 year language. The answer provided by the Court of Appeals, which neither side advocated for, was that years two through nine applied to an agent who died or became disabled:

> It is clear that the entire vesting schedule is relevant for agents who die or become disabled while in defendant's employment. However, given the agent's manual's definition of retirement, only the vesting schedule for beyond ten years of service is relevant for agents who retire. Thus, an agent who becomes disabled and stops working after seven years of service will have one hundred percent of his or her renewal commissions.... Thus, although the vesting schedule's applicability to retirement situations is limited by the agent's manual's definition of "retirement," there is no ambiguity or contradiction within the contract. (102-03a.)

The obvious error with the Court of Appeals' analysis, of course, is that it overlooked paragraph 5(A) of the contract (and the testimony from UIG's own president), pursuant to which agents who die or become disabled are 100% vested from the outset, as opposed to the percentages of vesting corresponding to years two through nine of the Vesting Schedule. In fact, paragraph 5(A) explicitly refers to the "normal vesting schedule" for deceased or disabled agents who have eight or **more** years of service.

> If upon the date of death, disability, or retirement, Agent shall have aggregated eight (8) or more years of service under this Agreement, his then vesting shall be determined in accordance with the normal vesting schedule. (12a.)

In short, in its haste to attribute meaning to the Vesting Schedule and thereby eliminate the contradiction between the Vesting Schedule and the Agent's Manual, the Court of Appeals got it exactly backwards.

Klapp moved the Court of Appeals for rehearing, informing the Court of Appeals that it had overlooked paragraph 5(A) and UIG's admissions regarding agents who died or became disabled. UIG's opposition to rehearing (as well as its opposition to Klapp's application

for leave to appeal to this Court) is significant because UIG conceded, as it must, that the Court of Appeals erred. UIG's opposition essentially conceded that years two through nine of the Vesting Schedule cannot, in light of paragraph 5(A) and its president's admissions, apply to an agent who dies or becomes disabled, and thus that the Court of Appeals' attempt to import that meaning to the Vesting Schedule yielded an impossible result. The best that UIG could do was to argue that the Vesting Schedule *for years 10 and above* could possibly be consistent with the Court of Appeals' ruling, which, of course, misses the point entirely. (104a.) To find that the contract was unambiguous, the Court of Appeals had to import some logical meaning to years two through nine of the Vesting Schedule (Klapp, in particular, had seven years of service), and not even UIG's opposition to rehearing (or opposition to leave in this Court) attempted to explain how the Court of Appeals' interpretation could possibly be correct in that regard. Nonetheless, the Court of Appeals denied rehearing without comment. (105a.)

D. Supreme Court Proceedings.

On September 10, 2002, the Court granted Klapp's application for leave to appeal from the February 9, 2001, decision of the Court of Appeals. The Court directed that the parties brief the following additional issue:

> Where, as in the present case, a contract is drafted entirely by one party, without any bilateral negotiations, is extrinsic evidence admissible to clarify ambiguity in the contract or is any ambiguity in the contract simply to be construed against the drafter (without considering any extrinsic evidence)? (106a.)

ARGUMENT

A. At a Minimum, the Agent's Agreement is Ambiguous Because the Vesting Schedule Conflicts with the Agent's Manual.

The question of whether a contract is ambiguous is a question of law which is reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

"A contract is ambiguous when it contains language which may be interpreted more than one way and there is nothing to indicate which meaning is intended or where there is contradictory or necessarily inconsistent language in different portions of the instrument." *Sentry Security Systems, Inc v DAIIE,* 56 Mich App 182,189; 223 NW2d 708 (1974), *quoting Fadden v Cambridge Mutual Ins Co,* 51 Misc 2d 858; 274 NYS2d 235 (1966), *reversed on other grounds,* 394 Mich 96; 228 NW 2d 779 (1975). In other words, "[i]t is a fundamental principle of law that, if the language of a written contract is subject to two or more reasonable interpretations or is inconsistent on its face, the contract is ambiguous, and a factual development is necessary to determine the intent of the parties." *Petovello v Murry*, 139 Mich App 639, 642; 362 NW2d 857 (1984). As the Court explained in *Loyal Order of Moose v Faulhaber*, 327 Mich 244, 250; 41 NW2d 535 (1950):

> The contract between the parties, as written, is not free from ambiguities. The provision on which defendant relies, if taken literally, is inconsistent with other provisions emphasized by counsel for plaintiff. The agreement must be construed, if possible, in such a manner as to carry out the intent of the parties.

Where a contract is ambiguous, the interpretation of the contract is a question for the jury. *Hewett Grocery Co v Biddle Purchasing Co,* 289 Mich 225, 236; 286 NW 221 (1969); *Zinchook v Turkewycz*, 128 Mich App 513, 521; 340 NW2d 844 (1983); *Anderson v Brown*, 21 Mich App 699, 703-04; 176 NW2d 457 (1970).

In this case, there is, at a bare minimum, a direct conflict and inconsistency between the Vesting Schedule and the age 65/10 year language in the Agent's Manual. On the one hand, Klapp demonstrated that the ordinary meaning of the term "vesting" in the Vesting Schedule is a "guaranteed" or "inalienable" right to the commissions, in this case based on the number of years of service, beginning at two years. (59, 74a.)[5] The Vesting Schedule thus guaranteed or made inalienable to Klapp 100% of the renewals, given Klapp's seven years of service. On the other hand, according to UIG, the language in the Agent's Manual provides that "vestment" occurred only after 10 years of service and age 65.[6] The ambiguity was properly resolved by the jury before the verdict was negated by the Court of Appeals.

The inconsistency and ambiguity in the contract is further highlighted by the "definition" of "retirement." As noted above, the Vesting Schedule provision in the contract

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[5]It is proper for the Court to consult the ordinary dictionary definition of a contract term. *See, e.g., Terrien v Zwit*, 467 Mich 56, 63-64; 648 NW2d 602 (2002).

[6]Strictly speaking, the ordinary meaning of the term "vestment" in the Agent's Manual is "an outer garment" such as "a robe of ceremony or office" (64,74a), and Klapp is not challenging his entitlement to such a piece of clothing in this suit. This absence of a conflict between the two provisions, viewed literally, only reinforces the lack of error in the trial court's judgment in favor of Klapp.

refers, by its stated terms, to the Agent's Manual only for the "definition" of "retirement," not also for the outdated "vestment" criteria: The Vesting Schedule applies to "retirement (as *defined* in the Agent's Manual)." (13a.) (emphasis added) And in the Agent's Manual, UIG specified that: "Retirement is understood to be disengagement from the insurance industry" (8a), a definition that Klapp indisputably satisfied. Furthermore, as Klapp established in opposition to UIG's motion in the trial court, each and every UIG witness admitted that the *definition* of "retirement" was "disengagement from the insurance industry," nothing more and nothing less. (59-60a.) Even Robert Pavlock, the attorney who assisted UIG in drafting its contract, admitted so. (60a.) Once in litigation, UIG cannot magically change the wording of the contract it drafted, as it must do in order to argue successfully that there is no ambiguity.

UIG's only response to this inconsistency and contradiction between the Vesting Schedule and the Agent's Manual is to ignore the Vesting Schedule and to contend that the Agent's Manual, viewed in **isolation**, is clear and unambiguous. That may well be true, but it is also legally erroneous. It is well-settled that portions of a contract cannot simply be ignored. *Mondou v Lincoln Mut Casualty Co,* 283 Mich 353, 358-59; 278 NW2d 94 (1938) (a contract should be construed "so as to give effect to every word or phrase as far as practicable").

Given the direct conflict between the two provisions, the contract is ambiguous, and the trial court properly sent the case to the jury. After all, if the true intent of the contract, with respect to agents who decide to leave the industry, was for vesting to occur only if they worked for 10 years and also attained the age of 65, then there was no reason for UIG to pay vested commissions *for 10 straight years* to agents, including Klapp, who left the industry

without 10 years of service and without attaining age 65. And if the true intent was to "vest" the agents only at 10 years and age 65, then there was no reason for UIG to insert the "Vesting" Schedule into the contract (unless UIG was trying to deceive agents concerning their rights through shoddy or intentionally unclear draftsmanship).

UIG has also contended that the clear admissions concerning the meanings of the terms "retirement" and "vesting" from its own management witnesses constitute impermissible parol evidence. This argument is unavailing because, at the threshold, the ambiguity exists simply upon consideration of the ordinary, dictionary definition of "vesting" and the "definition" of "retirement"in the Agent's Manual. Moreover, as this Court has stated, the "initial issue on the contract is a matter of the interpretation of the words used.... [The] meaning [of words] must be ascertained in the light of all the relevant circumstances, not excluding, where helpful, 'the experience of courts and linguists,' and including, as well, the meaning accepted by the parties." *Davis v Kramer Bros Freight Lines, Inc*, 361 Mich 371, 375; 105 NW2d 29 (1960) (footnotes omitted). The Court more succinctly stated this applicable law in *First Baptist Church v Solner*, 341 Mich 209, 215; 67 NW2d 252 (1954):

> Where any doubt arises as to the true sense and meaning of the words themselves or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. In this case parol evidence is admissible *ex necessitate*.

See also Goodwin, Inc v Coe, 392 Mich 195, 204-11; 220 NW2d 664 (1974).

B. The Court of Appeals' Superficial Attempt to Resolve the Conflict and Ambiguity Does Not Withstand Simple Scrutiny.

The Court of Appeals properly recognized that it was improper, despite UIG's argument to the contrary, simply to ignore years two through nine of the Vesting Schedule. The Court of Appeals thus recognized that it needed to find some plausible meaning to years two through nine in order to find the contract unambiguous and render moot the other issues presented for appellate review. The Court of Appeals did so by coming up with a contract interpretation never advocated by either party, and, in its haste, failed to consider whether its new interpretation was consistent with other provisions in the contract.

The interpretation created by the Court of Appeals -- that years two through nine of the vesting schedule define the vesting rights of agents who die or become disabled -- is inconsistent with paragraph 5(A) of the contract (as well as the admissions from UIG's president), which grants 100% vesting to such agents from the outset of the employment relationship. (12, 92-93a.) Accordingly, it is *impossible* for the Court of Appeals' construction to be correct. Although paragraphs 5(A) and 5(B) both on their face refer to deceased and disabled agents (as well as retired agents) with different wording, the only practical, logical and common sense meaning of paragraph 5(A) is that an agent who dies or becomes disabled is vested at least at 100%, as UIG itself conceded in its opposition to rehearing in the Court of Appeals. (104a.) Accordingly, years two through nine of the vesting schedule, which provide for different vesting, cannot possibly be explained, as the Court of Appeals attempted to do, by

reference to the rights of deceased and disabled agents. It follows that the only other possibility is that years two through nine of the vesting schedule apply to agents who retire, which gives rise to the same contradiction with the Agent's Manual, the same inconsistency, and the same ambiguity that the Court of Appeals hastily attempted to explain away. In short, the Court of Appeals clearly erred by attempting to create a new contract construction which is inconsistent with overlooked paragraph 5(A).

C. An Ambiguity Should Be Construed Against the Drafter if Extrinsic Evidence Does Not Resolve the Ambiguity.

Under this Court's prior decisions, there does not appear to be a clear answer to the question that the Court directed the parties to address. Considering secondary sources of authority, however, it appears that the rule of interpretation against the drafter is the "tie breaker" for circumstances in which extrinsic evidence does not resolve the contract ambiguity.

There are a number of decisions from the Court setting forth the general rule that a contract ambiguity should be construed against the drafter. For example, in the context of an insurance policy, the Court has stated that an ambiguous policy "should be construed against its drafter and in favor of coverage." *Raska v Farm Bureau Mut Ins Co,* 412 Mich 355, 362; 314 NW2d 440 (1982). In the context of an employment agreement, the Court has stated: "As the contract period under consideration is ambiguous, it must be construed against its drafter, the defendant." *Herweyer v Clark Highway Services, Inc,* 455 Mich 14, 22; 564 NW2d 857 (1997). In interpreting a land contract, the Court affirmed the lower court's holding "that the ambiguous term was to be strictly construed against the preparer of the contract." *Keller v Paulos Land Co,*

381 Mich 355, 362; 161 NW2d 569 (1968). And in construing a real estate listing agreement, the Court affirmed the trial court's contract construction in which the trial court held that a "contract *must* be construed *most* strongly against the party preparing it." *Roy Annett, Inc v Killian,* 365 Mich 389, 394; 112 NW2d 497 (1961).[7] There does not, however, appear to be precedent from the Court squarely addressing the relationship between extrinsic evidence and the rule of interpretation against the drafter.

But a closer examination of the Court's precedents suggests that extrinsic evidence is admissible to clarify an ambiguity, and, in the absence of such evidence, the ambiguity should be construed against the drafter. For instance, in *Roy Annett, supra,* the trial court admitted testimony concerning discussions between the contracting parties regarding the ambiguous term. 365 Mich at 392; 112 NW2d 497. On appeal, the Court affirmed the admission of the testimony, quoting with approval this language from *In re Traub Estate,* 354 Mich 262, 280; 92 NW2d 480 (1958):

> As long as the court is aware that there may be doubt and ambiguity and uncertainty in the meaning and application of agreed language, it will welcome testimony as to antecedent agreements, communications, and other factors that may help to decide the issue. [365 Mich at 395; 112 NW2d 497]

Similarly, in *Keller, supra*, although the Court stated the rule of interpretation against the drafter, the Court also held that the "trial court properly permitted oral testimony to determine the true intent of the parties." 381 Mich at 362; 161 NW2d 569.

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[7]This is by no means an exhaustive listing of the cases stating the general rule.

These cases, while acknowledging that an ambiguity should be interpreted against the drafter, in fact approved of extrinsic evidence to clarify the ambiguity and did not automatically construe the ambiguity against the drafter. Cases such as *Herweyer, supra,* and the cases involving insurance policies, in which no reference is made to extrinsic evidence, are not necessarily inconsistent. These cases may be explainable as cases in which there simply was no extrinsic evidence, such as contemporaneous discussions or a course of dealing, relevant to clarifying the ambiguity, and the Court therefore construed the ambiguity against the drafter. Klapp's research has not produced any case from this Court in which extrinsic evidence was held to be inadmissible for the reason that the ambiguity was merely to be construed against the drafter.

Secondary sources of authority have squarely addressed the issue. According to Corbin, the rule of interpretation against the drafter is used if extrinsic evidence does not resolve the ambiguity:

> When the terms of a written contract have been authored by one of the parties and merely assented to by the other, this fact will in some cases influence the interpretation that the court will give to these terms. After the court has examined all of the other factors that affect the search for the parties' intended meaning, including general, local, technical and trade usages and custom, and including the evidence of relevant circumstances which must be admitted and weighed, there may yet remain a question as to what meaning was intended and should be given effect.... If ... it is clear that the parties did attempt to make a valid contract and the only remaining question is which of two possible and reasonable meanings should be adopted, the court will often adopt the meaning that is less favorable in its legal effect to the party who chose the words.... [The] rule has been described as being

> applicable only as a last resort, when other techniques of interpretation and construction have not resolved the question of which of two or more possible reasonable meanings the court should choose. One court wrote that it is "a tie breaker when there is no other sound basis for choosing one contract interpretation over another."

Corbin, Contracts (2001 ed), § 24.27 (footnotes omitted). *Accord*, 11 Williston, Contracts (4th ed), § 32:12, p 480 ("The rule of *contra proferentem* [interpretation against the drafter] is generally said to be a rule of last resort and is applied only where other secondary rules of interpretation have failed to elucidate the contract's meaning"). Similarly, in words that ring true for the present case, the drafters of the Restatement observe as follows:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases.

Restatement Contracts, 2d, § 206, p 105, comment a.

In our case, the trial court's judgment in favor of Klapp should be reinstated regardless of whether the rule of interpretation against the drafter is properly invoked as a rule of first resort or as a rule of last resort. If invoked as a rule of first resort, the conflict between the Vesting Schedule and the Agent's Manual should be resolved against UIG as the party who

drafted the standardized contract. UIG chose the language for the contract, and it could easily have drafted it to eliminate any contradiction or uncertainty. Even if UIG did not leave the language deliberately obscure when drafting the contract, so that it could decide later which meaning to assert, the denial of UIG's motion for summary disposition was proper, and the resulting judgment in favor of Klapp should be reinstated.

If, as indicated in the secondary sources of authority, the rule of interpretation against the drafter should be invoked, if necessary, after consideration of extrinsic evidence, then the trial court's judgment should also be reinstated. The extrinsic evidence against UIG and in favor of Klapp was overwhelming. Not only did UIG management explain to Klapp that the Vesting Schedule defined his vesting rights (90-91a), but UIG's decade-long course of dealing with Klapp and all others similarly situated leaves no room for doubt. In this regard, the Restatement provides the following example for extrinsic evidence of course of dealing:

> A, sugar company, enters into a written agreement with B, a grower of sugar beets, by which B agrees to raise and deliver and A to purchase specific quantities of beets during the coming season. No price if fixed. The agreement is on a standard form used for B and many other growers in prior years. A's practice is to pay all growers uniformly on a formula based on A's "net return" according to A's established accounting system. Unless otherwise agreed, the established pattern of prices is part of the agreement.

Restatement Contracts, 2d, § 223, pp 157-58. Consistent with this example, Klapp, at both summary disposition and at trial, presented undisputed evidence concerning the practice of UIG paying renewal commissions under its contract, for 10 years, to all agents who disengaged from

the insurance industry in accordance with the Vesting Schedule, disregarding the outdated age 65/10 year language in the Agent's Manual. UIG used the identical standardized contract for all of these agents, including Klapp. As the Court has succinctly explained in this context:

> If the contract has been in part performed, the construction placed by the parties themselves on terms in it which are indefinite and uncertain may be shown and should always be considered by the court. It will always be assumed that the parties themselves understood what was meant by the language used and are not liable to be mistaken about it, and if, in performing under it, they have treated the uncertain or ambiguous terms as having a particular meaning, the construction thus placed upon it by them will have great weight with the court.

Lichnovsky v Ziebart Int'l Corp, 414 Mich 228, 238 n16; 324 NW2d 732 (1982), *quoting McIntosh v Grooms,* 227 Mich 215, 220; 198 NW 954 (1924).[8] Here, UIG construed its own contract as requiring payments pursuant to the Vesting Schedule for 10 straight years, and it did not even attempt to rely on the language in the Agent's Manual. Considering this evidence, the trial court properly denied the motion for summary disposition, and the jury properly returned a verdict for Klapp. Because UIG has not challenged the admission of any of the evidence or the jury instructions on appeal, the decision of the Court of Appeals should be reversed, and the trial court's judgment in favor of Klapp reinstated.

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[8]Williston has observed: "In innumerable cases, and for reasons so varied as to defy classification, litigants at some later date seek to place an interpretation on their agreements at variance with that indicated by their earlier conduct, utterances, or performance. The obligations entailed by the agreement may in time prove more onerous than the promisor envisaged.... But whatever the nature of the case, the court will apply the canon of contemporaneous and subsequent construction unless this is contrary to the plain meaning of the contract." 4 Williston, Contracts, § 623, pp 791-93 (3rd ed 1961).

CONCLUSION

For the foregoing reasons, Klapp requests that the Court reverse the February 9, 2001, decision of the Court of Appeals, and that the Court remand the action to the Court of Appeals for consideration of the appellate issues that the Court of Appeals failed to address.

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